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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

COUNTY SANITATION DISTRICT NO. 2 OF LOS ANGELES COUNTY, Plaintiff and Appellant, v. COMPLETE GARMENT, INC., Defendant and Respondent.	B253161 (Los Angeles County Super. Ct. No. BC 484746)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard E. Rico, Judge. Affirmed.

Lewis Brisbois Bisgaard & Smith, Roy G. Weatherup, Allison A. Arabian, Claire Hervey Collins, and Jessica A. Lineau for Plaintiff and Appellant.

Emilio Law Group, Daniel G. Emilio, Kyle J. Waldie, and Laurie M. Cortez for Defendant and Respondent.

INTRODUCTION

Appellant County Sanitation District No. 2 of Los Angeles County sued respondent Complete Garment, Inc., in superior court, alleging that respondent, a garment- and tie-dyeing operation, failed to pay the full amount of its statutorily-mandated wastewater discharge fees during fiscal years 2008-2009, 2009-2010, and 2010-2011. A bench trial was held on appellant's complaint. Following the presentation of evidence, the trial court indicated its view that the evidence had demonstrated appellant's figures for sewerage service fees owed were inaccurate. Offered an opportunity to present different figures, appellant asked the court to enter judgment in the full amount requested in its complaint. The court then entered a judgment awarding appellant nothing, finding that appellant's figures were "materially in error."

Appellant contends the trial court erred as a matter of law when it failed to award it the "mandatory civil penalties" under the governing statute. Appellant requests that this court reverse the trial court's judgment with directions to enter a new judgment for appellant "in the sum of money requested at the trial." For the reasons set forth below, we affirm the judgment.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. The Complaint

On May 24, 2012, appellant filed a complaint for damages against respondent, alleging that on multiple occasions, respondent had violated the April 1, 1972 Wastewater Ordinance, as amended July 1, 1998 (Wastewater Ordinance), by failing to pay the full amount due for its wastewater discharges (the surcharges) into appellant's sewerage system during the fiscal years 2008-2009, 2009-2010, and 2010-2011.

Respondent filed an answer, generally denying the allegations and raising numerous affirmative defenses. In a first amended answer, respondent specifically denied that appellant was damaged in the amounts stated in the complaint.

On May 2, 2013, appellant dismissed without prejudice three causes of action covering respondent's alleged failure to pay the full amount of the sewerage service fees for fiscal year 2011-2012.

Neither party filed dispositive motions, and trial was set for August 27, 2013.

B. The Bench Trial

1. Pretrial Proceedings

On July 8, 2013, the parties exchanged expert witness information. Appellant designated Greg V. Arthur as its expert, and proffered that his expert testimony would pertain to the "audit and review of wastewater surcharge statements as well as analysis of dyeing processes and the resulting wastewater."

Arthur had degrees in civil engineering, technical expertise in water pollution control, and three decades of experience at the United States Environmental Protection Agency.[1]

Respondent designated Jerry Kraim as its expert. Kraim, a licensed professional chemical engineer and a board-certified environmental engineer, had over 40 years of experience in environmental compliance engineering and management, including industrial air pollution control, and environmental auditing, reporting and permitting. His work experience included several years with the South Coast Air Quality Management District and the County of Los Angeles Air

[1] In opening statement, respondent's counsel, anticipating that Arthur would testify, stated that Arthur had acknowledged at his deposition that up to 20 percent of water used in a dye house could be lost to evaporation and not discharged into the sewerage system. However, appellant's counsel did not call Arthur.

Pollution Control District. Respondent proffered that Kraim's testimony would address the nature and extent of appellant's claimed damages. Kraim also would testify "as to the proper formula that will accurately calculate the amount of wastewater that was deposited into the sewer, and thus subject to the surcharge under the Wastewater Ordinance . . . ." Kraim produced two reports -- one on respondent's surcharge calculations, the other on appellant's calculations. Appellant deposed Kraim before trial. Appellant filed no objection to Kraim's qualifications, to his reports, or to his proffered testimony.

2. Trial Briefs

Both parties filed trial briefs. In its first amended trial brief, appellant argued that it was entitled to $118,954.86 in damages because respondent violated the Wastewater Ordinance by failing to accurately report its wastewater discharge and to pay audited surcharges in full as required under sections 214, 409 and 414 of the ordinance.[2] Appellant explained that because "different companies produce

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[2] Under section 214 of the Wastewater Ordinance, "[w]astewater treatment surcharges shall be determined in accordance with Section 409 of self-monitoring procedures performed by the industrial discharger pursuant to Section 414 and reported to the Districts as required by Section 411. Except as hereinafter provided, each industrial discharger shall make estimated surcharge payments to the Districts. Payments shall be due and payable on September 30, December 31, March 31, and August 15 of each year. Such payments shall be delinquent if not paid on said dates and collectively shall be in such amounts as shall equal the total surcharge payable as determined in accordance with procedures established by the Chief Engineer . . . ."

Under section 409 of the Wastewater Ordinance, "[e]ach industrial discharger not exempted under Section 411 shall pay to the Districts an annual wastewater treatment surcharge in accordance with Section 214." Under section 411, "[e]ach industrial discharger, except for those dischargers that fall within a flow classification exempted by the Chief Engineer, shall file annually with the Districts a wastewater treatment surcharge statement. . . . Each industrial discharger shall report on such statement the total annual surcharge due to the

greatly differing flows and strengths of wastewater, an average treatment cost cannot be applied uniformly. Instead, under the *Wastewater Ordinance*, each industrial user is required to separately monitor its wastewater and pay a self-calculated fee [a surcharge] that represents its share of wastewater conveyance and treatment costs." Appellant emphasized that the annual surcharge statements ensured that dischargers pay their "fair share of the costs of conveyance, treatment and disposal" of wastewater discharge.

Appellant explained that a surcharge booklet, sent to each discharger annually, contains detailed forms and instructions for measuring wastewater flow and computing the appropriate surcharge owed.[3] The instructions allow three ways to measure wastewater flow: (1) direct measurement, (2) metered water supply, or

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Districts and the wastewater discharge data used in making such calculations. Such information shall be provided on a form prepared by the Chief Engineer and shall be signed by the discharger under penalty of perjury. Dischargers shall comply with all instructions which accompany the Districts' forms. The discharger shall submit such additional data as the Chief Engineer may from time to time require in implementing the wastewater treatment surcharge program."

Under section 414 of the Wastewater Ordinance, "[e]ach industrial wastewater discharger shall make such measurements of wastewater flow volumes, flow rates, chemical oxygen demand (COD) and suspended solids (SS) as are necessary to accurately determine its annual wastewater treatment surcharge unless specifically relieved of such obligation by the Chief Engineer as provided under Section 409 of this Ordinance. Each discharger shall take at least the minimum number of flow measurements and wastewater samples for COD and SS analyses as required by the Chief Engineer. Dischargers who fail to perform required monitoring, fail to accurately perform such monitoring, or fail to properly report the results of such monitoring to the Districts shall pay the costs of any Districts' [*sic*] monitoring needed to satisfy applicable monitoring requirements."

[3] There was no dispute over the "strength" of respondent's wastewater discharge, or the amount of contaminants in the wastewater discharge. The only dispute involved the "flow" of wastewater discharge, i.e., how much wastewater was actually discharged.

(3) adjusted metered water supply. The direct measurement method reports the actual volume of industrial wastewater leaving the plant, using an effluent flow meter. The metered water supply method takes the full amount of water entering the property and subtracts the sanitary flow to compute the amount of wastewater discharged. Finally, the adjusted water metered supply method reports the amount of wastewater discharged by taking the full amount of water entering the plant, subtracting the sanitary flow, and deducting the amount of water consumed by plant operations. These deductions may include water losses from evaporation, steam boilers, landscape watering, and water incorporated into the user's product. Respondent used the adjusted metered water supply method for the years at issue.

Appellant alleged that respondent underreported its wastewater discharge by drastically overstating its deductions for evaporative loss. According to appellant, dye houses typically have evaporative losses from 3 percent to 10 percent, but respondent had been reporting figures between 29 percent and 65 percent. Appellant asserted that its engineers and expert (Arthur) would testify that respondent's evaporative loss claims were unsubstantiated and physically impossible. After appellant audited the surcharge statements and recomputed the surcharges, it determined that respondent owed additional surcharges, interest and penalties totaling $118,954.86.

Appellant also asserted that "[t]he damages at issue are a result of a combination of Complete Garment's own erroneous calculations of its wastewater discharge and its failure to substantiate its losses." Appellant further stated, "All monies due have been properly calculated pursuant to law and established policies and although Complete Garment has made partial payments, the full amount outstanding is $118,954.86 as of July 31."

In respondent's trial brief, it argued that appellant's audits were inaccurate because they used uniform calculations that ignored the unique nature of its business operations. It contended that appellant's failure to consider respondent's garment dyeing process, its use of an electric drying oven, and its open-air drying and outdoor drying methods, resulted in substantial miscalculations by appellant. Respondent also argued that flow meter data from 2011-2012, measuring the actual volume of wastewater leaving the facility, supported its claimed evaporative loss deductions.[4]

3. Appellant's Case

In her opening statement, appellant's counsel asserted that "[t]he district must treat all industrial users fairly," and that every residential or industrial user must pay its fair share of the sewage treatment costs. Counsel asserted that the evidence would show that respondent had not paid its fair share of the costs, as it had claimed "grossly overinflated evaporative deductions." According to counsel, respondent did not and could not substantiate its evaporative loss deductions.

David Snyder, section head of appellant's industrial waste section, testified about the wastewater surcharge process. Under the Wastewater Ordinance, industrial users must obtain a permit to connect to the sewage system and must pay a wastewater surcharge fee that covers their "fair share" of costs for the operations and maintenance of the sewage system. If one user does not pay its fair share, others must pay slightly higher rates to compensate. Industrial users are required to fill out surcharge statements on an annual or quarterly basis, showing the amount of wastewater they have discharged.

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[4] Because the flow meter was not installed until after the fiscal year 2011-2012, and appellant had dismissed the causes of action covering respondent's alleged failure to pay the audited surcharges in that year, the trial court granted appellant's motion in limine to exclude the flow meter data.

Snyder was the auditing supervisor for respondent's 2009-2010 surcharge statement. He acknowledged that he neither signed the audit summary, nor performed any of the calculations used in the audit. Snyder stated there was no closing date to accept substantiation of claimed deductions. Although he spoke with respondent's owner, Shaul Shaul, he never received any documentation to support the claimed deductions.

Linda Shadler testified that she had overseen 50 to 100 audits annually during her 19 years as appellant's supervising civil engineer. Without explanation, Shadler opined that there was nothing special or revolutionary about respondent's tie-dyeing process. Shadler testified that appellant audited respondent's 2008-2009 surcharge statement because respondent claimed evaporative loss deductions in excess of those claimed by a typical dye house.

In its 2008-2009 surcharge statement, respondent had claimed deductions for boiler evaporation, evaporation from garments drying, evaporation for wetted indoor ground surfaces, and water loss due to tie-dye solutions. Appellant denied the deductions. In lieu of the requested deductions, appellant granted respondent two deductions: a deduction for gas-fired oven drying, based on the amount of natural gas respondent had used, and a deduction for air drying, based on a formula for calculating evaporative loss from a ventilated room. The ventilated room formula took into account the size of the room, the average outdoor temperature and humidity for the greater Los Angeles area, the air exchange into and out of the room, and the moisture saturation of the air in the room. Based on the audited calculations, appellant allowed deductions totaling 4 percent for 2008-2009.

Appellant also audited the 2009-2010 and 2010-2011 surcharge statements, and using similar methodologies, granted evaporative loss deductions of 4 percent in 2009-2010, and 6 percent in 2010-2011.

Shadler conceded that if the assumptions used in appellant's calculations were incorrect, the conclusions in the audits would be inaccurate and incorrect. She acknowledged that during the three audits, no tests were conducted at respondent's facility to determine the accuracy of the assumptions appellant used in the audits. Shadler admitted that the audits did not take into account any evaporative loss for garment drying outside the building, or the use of an electric oven. Nor did the audits consider any air exchange from ventilation, cross-breezes, or seepage, such as from opened skylights. Shadler admitted the ventilated room formula uses an average outdoor monthly temperature for the greater Los Angeles area, measured for a single year prior to 2008. Shadler also stated that the ventilated room formula assumed an air exchange frequency based on fan(s) whose total CFM (cubic feet per minute) rating was 26,666.7. She conceded that a higher total CFM rating would change the air exchange amount and the subsequent evaporative loss calculation. Finally, Shadler opined that the maximum evaporative loss respondent could sustain was four to five percent; when asked whether she disagreed with the opinion of appellant's own expert that evaporative loss could be up to 20 percent, she reiterated her opinion.

Sharie Pike, revenue collection supervisor, testified that she oversaw the collection of surcharge revenues. She had sent letters to respondent outlining the result of the various audits. Respondent never contacted her about the audits, and she received no additional data or substantiation. Pike also testified that when respondent submitted its surcharge statements for the three fiscal years at issue, it made only partial payments.

Despite listing him on its witness list, appellant declined to call its expert, Arthur, and rested its case-in-chief.

4. Respondent's Case

Shaul testified about the uniqueness of respondent's business and the tie-dye and garment dye process. According to Shaul, the dye house had multiple skylights and three fans. In 2008-2009, the facility operated 24/7, and some garments were taken outside the building and air-dried in the adjacent parking lot. Shaul further testified that the average temperature inside the dye house was much higher than outside. Shaul testified that he conversed with several of appellant's employees about the audits. Their response to his inquiries was that he should install a flow meter, which he eventually did.

Jose Elias Torres Chavez (Torres) was respondent's general manager during the three fiscal years at issue. He testified that the dye house had three fans, each with a 34,000 CFM rating. There were also 10 skylights, which were opened for ventilation almost every day. Torres testified that garments were dyed in tubs. The facility had six tubs with a capacity of 300 gallons of water. The garments would be placed inside the tubs, and soda ash and a dye mixture would be added. The dye mixtures were generally one gallon of dye for every nine gallons of liquid. Torres testified that the garments would soak up the liquid mixture in the tubs, and that the tubs were refilled seven times a day. Torres further testified that after garments were dyed, some were placed outside in the parking lot to dry, some were placed on drying racks inside the facility, others were sent straight to the gas dryer, and some sent to the electric oven.

Shadler was called as a hostile witness. She testified that the ventilated room formula did not use the average temperature for the inside of respondent's building, and none of appellant's employees went to the facility to determine average temperatures. She conceded that if the temperature within the building was higher than outside, more water could be evaporated inside the building than

calculated by the formula. Similarly, more water could evaporate if the air exchange frequency was greater due to more fans. On redirect, Shadler stated that if there were three fans whose total CFM rating was three times greater than the CFM rating used in the ventilated room formula, the resulting evaporative loss deduction would be about nine percent, rather than the four percent used by appellant in the 2008-2009 audit.

Respondent called Jerry Kraim as an expert witness. Appellant raised no objection. Kraim testified that he held a degree in chemical engineering from UCLA and was a member of numerous professional engineering groups. He had been providing environmental engineering consulting services since 1983, and had been called upon by the City of Los Angeles to perform calculations and certification of evaporation losses from one of the city's facilities. For the instant matter, Kraim had prepared two reports, one dated December 9, 2012, and the other dated August 11, 2013. Prior to preparing the reports, he visited the dye house and took internal temperature and humidity readings. In the December 9, 2012 report, he examined respondent's claims of evaporative loss. Kraim opined that the evaporative losses claimed were reasonable, and even understated. His opinion was based on experimental data provided by respondent.

Kraim's August 11, 2013 report focused on appellant's calculations for evaporative loss. He opined that appellant erred in using average outdoor meteorological data and assuming a single fan. Kraim noted that the dye house had three fans, and concluded that the air exchange calculations were wrong by nearly a factor of three. Kraim explained that because the relationship between temperature and evaporation is not linear, a small change in temperature would result in a proportionally larger evaporative loss. Thus, he opined that using average meteorological data would produce a "significant" error in the

calculations. Finally, he opined that appellant erred by not taking into account water retention in the dried garments and in the soda ash-dye mixture.

On cross-examination, Kraim was asked about his deposition testimony that "when it comes to method of drying using the ovens, I informed [respondent's counsel] that the formula that the District uses is correct." Kraim explained that his answer pertained to the formula appellant had used to determine evaporative loss from a gas-fired oven, not an electric oven. On redirect, Kraim opined that the use of an electric oven would increase the evaporation rate.

Appellant presented no rebuttal case.

5. The Closing Trial Briefs

After the parties rested, the trial court inquired of counsel: "What am I suppose to determine? Am I supposed to determine whether the County Sanitation Department's surcharge is correct? If [the surcharge is] . . . wrong by a penny, does that mean that there's a defense verdict, or am I suppose to independently determine an amount?" Appellant's counsel stated that "the burden is preponderance of the evidence." The court asked, "[D]o you have to prove by a preponderance of the evidence the amount you're requesting . . . . And if I find that you're wrong . . . , does that mean I have to find for the defense?" Appellant's counsel first replied no, but when the court asked whether it should determine the amount owed, appellant's counsel insisted that the court should enter judgment in the amount prayed for in the complaint. Respondent's counsel reiterated its dispute with appellant's figures. The court then stated: "I'll tell you quite frankly, I think that the defense has established enough evidence that I would find that the county sanitation department's calculations are off. . . . The company's estimates are also inaccurate to some extent, based on the evidence I've heard." The court

directed the parties to submit additional briefing, and stated it would entertain arguments about other numbers.[5]

In its closing trial brief, appellant argued that the evidence at trial established that respondent owed $118,954.86. It stated: "The burden of proof in this matter is a preponderance of the evidence and the District's evidence in support of its claim for damages far outweighs the evidence presented by Complete Garment in its defense. . . . [¶] If the Court believes that the District did not prove its case 'to the penny,' the Court should still enter judgment for the District in the full amount prayed for. As the trier of fact, the Court must weigh the evidence and decide whether the District's calculations are more reasonable than Complete Garment's." Appellant asserted that its audited figures complied with the Wastewater Ordinance, as it "used the data available to it at the time and audited Complete Garment's surcharge statements using standard engineering methodologies." Appellant contended that its "engineering estimates of what is owed provides the 'reasonable basis of calculation' and 'reasonable certainty' necessary to support entry of judgment in the amount of $118,954.86." Finally, appellant argued the evidence presented at trial showed that respondent's calculations were not reasonable, and that appellant's audited calculations of surcharges owed were reasonable.

In respondent's closing trial brief, it argued that appellant, as the plaintiff, had the burden to prove, by a preponderance of the evidence, that its audited figures were accurate. Respondent argued that appellant failed to meet its burden at trial, citing to testimony by its expert Kraim and appellant's own witness

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[5] During this colloquy, the court encouraged the parties to settle and noted that the evidence established that respondent had made only partial payments on the surcharges it claimed to owe.

Shadler that the use of a single fan and average atmospheric data would significantly affect the calculations in respondent's favor. Respondent also argued that due to appellant's trial tactics of seeking "'all or nothing,'" no evidence or theory of calculating any other sum was presented that would allow the trial court to enter judgment in a lesser amount.

6. Trial Court's Ruling

On September 16, 2013, the trial court ruled in favor of respondent. In its written statement of decision, the court stated: "The court finds that plaintiff [appellant] has failed to meet its burden of establishing that the amount sought is reasonably accurate. The defendant [respondent] has established that . . . some of the assumptions plaintiff used to calculate the amount of waste water put into the sew[er]age system were incorrect. As a result, the amount calculated by the plaintiff is materially in error and hence the plaintiff has failed to meet its burden."

C. Motion for a New Trial

On October 15, 2013, appellant noticed its intent to move for a new trial. In its memorandum in support of the motion, appellant argued that the trial court erred in requiring it to make "to the penny" calculations in order to impose liability on a discharger. Appellant also argued, for the first time, that the court lacked discretion under the Wastewater Ordinance to award nothing, and that the court was compelled to accept appellant's determination that respondent owed $118,954.86, absent evidence that appellant's estimating practices were unreasonable. Appellant further contended, for the first time, that respondent had forfeited the right to challenge the audited figures, because respondent failed to avail itself of the appeals procedures outlined in the Wastewater Ordinance.[6]

[6] Under section 213 of the Wastewater Ordinance, "[a]ny permit applicant, permit holder or wastewater discharger adversely affected by any decision, action

or determination made by or on behalf of the Districts by the Chief Engineer in interpreting or implementing the provisions of this Ordinance or any permit issued hereunder, may file with the Districts a written request for reconsideration. Such requests shall be acted upon only if received within 45 days from the date of occurrence of the action in dispute. . . . Persons requesting reconsideration shall promptly furnish all additional information and produce all additional documents requested by the Chief Engineer which are relevant to the subject matter of the request for reconsideration. Failure to promptly furnish all such information and documents shall be grounds for a denial of the request for reconsideration. [¶] If the ruling made by the Chief Engineer is unsatisfactory to the person requesting reconsideration, the person may file an appeal with the Board of Directors of District No. 2."

Under section 415 of the Wastewater Ordinance, entitled "Discrepancies Between Actual and Reported Industrial Wastewater Discharged Quantities," "Should measurements or other investigations indicate that an industrial wastewater discharger has discharged industrial wastewater, chemical oxygen demand, suspended solids or other wastewater constituents at rates or in quantities in excess of those stated by the discharger on a wastewater treatment surcharge statement or other report furnished by the discharger to the Districts, the discharger shall furnish all information in its possession relevant to the apparent discrepancy."

"If, after making proper allowance for relevant factors, the Chief Engineer is unable to resolve the discrepancy on the basis of the information available, the Chief Engineer may order that additional information be obtained by Districts' employees through engineering investigations, tests, flow measurements and wastewater sampling and analyses. All costs of engineering investigations, flow measurements, wastewater sampling and analyses and other actions performed by the Districts to resolve the discrepancy shall be paid for by the discharger."

"The Chief Engineer shall then make a determination of the amount of any wastewater treatment and disposal charges plus charges for costs of obtaining additional information which are due to the Districts, together with any interest and penalty charges due, and shall notify the discharger of the total charges due. The discharger shall pay such amounts within 45 days after service of written notice. . . . [¶] The discharger may, within 12 months after payment of a wastewater treatment surcharge, submit a request for a refund together with appropriate supporting data. The Districts will consider this request and if a refund is due it shall be granted."

In opposition to appellant's motion for a new trial, respondent argued that appellant had the burden to prove the audited surcharges were reasonably accurate and failed to do so at trial. Respondent contended that the evidence presented at trial showed appellant's figures were so materially erroneous that they could not be characterized as estimates based on "'generally accepted engineering estimating practices.'" Respondent argued that appellant had waived or forfeited its claim that the audited figures could not be challenged in court by failing to raise it previously, citing the doctrine of judicial estoppel. Moreover, respondent asserted, the Wastewater Ordinance did not prohibit such challenges.

In its reply, appellant contended that it had met its burden of proof under the Wastewater Ordinance when it showed that its auditing methodology was reasonable. For the first time, it asserted that under the Wastewater Ordinance, it did not have the burden of proving that the audited figures were reasonable; rather, it was respondent's burden at trial to show that respondent's reported surcharge figures were reasonable. Appellant agreed that the doctrine of administrative exhaustion was not applicable, but argued that respondent was barred from challenging the audited figures under the "doctrine of forfeiture." Appellant further denied that it had waived or forfeited this argument, asserting that "[a] party cannot waive the proper application of the law or stipulate to legal error."

On November 19, 2013, the trial court denied the motion for a new trial. In its written statement of decision, the court took exception to appellant's argument that the court's decision required a "to the penny" calculation before imposition of liability. The court noted that it had found that the amount calculated by appellant was "'materially in error.'" It further noted that appellant "never presented expert testimony to establish a basis for its calculations and instead relied on a report which the court found to be based on incorrect assumptions." The court reiterated

that under California law, appellant had the burden of establishing that the audited surcharges were reasonably accurate. It reaffirmed its ruling that appellant failed to present sufficient evidence to support its claim for the unpaid surcharges.

On December 12, 2013, appellant noticed an appeal from the judgment after trial and from the order denying its motion for a new trial.

DISCUSSION

Appellant contends the trial court committed numerous errors based on the court's misinterpretation of the Wastewater Ordinance. Appellant first asserts that because the Wastewater Ordinance is a strict liability statute, on the undisputed facts the trial court lacked discretion to do anything other than enter a judgment in the amount requested in the complaint. Second, appellant contends the trial court erred in determining the elements of a cause of action for violation of the Wastewater Ordinance, and compounded its error by misallocating the burden of proof on the issue of the reasonable accuracy of the surcharge figures. Finally, appellant argues there was insufficient evidence to sustain the trial court's finding that it failed to meet its burden to prove that the audited surcharge figures were reasonably accurate.

A. Trial Court's Discretion to Determine Liability and Damages Under the Wastewater Ordinance

Appellant contends that once it presented evidence that respondent had failed to substantiate the claimed deductions and to pay the audited surcharges, the trial court was compelled to enter a judgment in its favor in the amount prayed for in the complaint. Appellant argues that respondent forfeited its right to challenge the audited surcharges by not availing itself of the appeal and reconsideration procedures set forth in the Wastewater Ordinance. Indeed, in its reply brief, for the first time, appellant contends that respondent lacked any option under the

Wastewater Ordinance, except to pay the audited surcharge figures.[7] In essence, appellant claims that its prima facie case created an irrebuttable presumption that it was entitled to the sums prayed for in the complaint.

Were appellant correct, there would have been no need for a trial, as it was undisputed that respondent failed to pay the surcharges as calculated by appellant. However, appellant neither moved for summary judgment nor sought a directed verdict at the close of trial. Contrary to the position taken on appeal, at trial, appellant never suggested the reasonableness of its own figures was immune to challenge, nor did it object to evidence disputing the accuracy of those figures. Indeed, in its closing brief following trial, appellant asserted that it had shown its calculations of surcharges were "reasonable." (See *Ernst v. Searle* (1933) 218 Cal. 233, 240-241 ["The rule is well settled that the theory upon which a case is tried must be adhered to on appeal. A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant"]; *Jackson v. County of Los Angeles* (1977) 60 Cal.App.4th 171, 181, 183 [under the doctrine of judicial estoppel, party may not assert position in legal proceeding contrary to or totally inconsistent with a position previously taken in the same or earlier proceeding].)

Notably, appellant never challenged the competency of respondent's expert, Kraim. Notwithstanding that much of Kraim's testimony was aimed at challenging the accuracy of appellant's calculated surcharges, appellant never objected to the relevance of, or foundation for, such testimony. Nor did appellant move to strike

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[7] Appellant offers the concession that respondent could have challenged appellant's audited surcharge figures and sought a refund for overpayment in administrative or judicial proceedings, if respondent had paid the fees under protest and submitted "appropriate supporting data."

any part of it. In short, at no time did appellant suggest it could prevail without convincing the court by a preponderance of the evidence (a) that respondent owed appellant money and (b) that it had proven the amount owed. (See *Telles Transport, Inc. v. Workers' Comp. Appeals Bd*. (2001) 92 Cal.App.4th 1159, 1166-1167 ["[U]nder general civil litigation principles, 'where a deliberate trial strategy results in an outcome disappointing to the advocate, the lawyer may not use that tactical decision as the basis to claim prejudicial error.' [Citations.]"].)

Moreover, as a matter of law, the Wastewater Ordinance does not preclude a discharger from challenging audited surcharges in court. Under section 202 of the Wastewater Ordinance, "any person who violates any provision of this Ordinance . . . shall be civilly liable to the Districts in the maximum sum provided by law for each day in which such violation occurs." It further provides that "District No. 2 is further delegated the sole authority to commence civil actions to enforce the provisions of this Ordinance and to recover any sums due hereunder." The Wastewater Ordinance, however, contains no express limitation on the evidence that may be presented in court proceedings. Similarly, it proscribes no penalties in court proceedings for a discharger's failure to avail itself of administrative appeal and reconsideration remedies set forth in section 215 of the ordinance.

To the extent the Wastewater Ordinance is a strict liability statute, the mere fact that it imposes strict liability would eliminate only appellant's burden to prove respondent's mens rea. It does not eliminate appellant's burden to prove that respondent violated the statute or that appellant was entitled to the specific remedies set forth in the complaint. (See *People v. Chevron Chemical Co*. (1983) 143 Cal.App.3d 50, 56 [strict liability statute requires no proof of either intent or negligence].) The Wastewater Ordinance does not provide that appellant has an

irrebuttable presumption that the audited surcharge figures are the "sums due" for violation of the statute. Thus, in order to prevail on its causes of action for statutory violation, appellant was obligated to prove the proper amount of damages -- "the maximum sum provided by law for each day in which such violation occurs." Significantly, appellant has never attempted to demonstrate what monies might have been due had it corrected its audited surcharge figures to conform to the evidence offered by respondent and credited by the court. Indeed, in response to the court's inquiry, appellant continued to assert that it was entitled the full amount of its prayer -- and nothing less. As respondent notes, given the state of the record, it would have been impossible for the court to calculate the actual surcharges and penalties owed. In any event, even on appeal, appellant has not sought an amount different from that sought in its complaint, but asks for a judgment in its favor "in the sum of money requested at the trial." In short, nothing in the Wastewater Ordinance obligated the trial court, after finding appellant had failed to meet its burden of proving the proper amount of damages, to render a verdict in appellant's favor or to award it anything.[8]

B. Cause of Action for Violation of the Wastewater Ordinance

In an action for violation of a specific statute, the statute sets forth the elements of the cause of action. Moreover, although a plaintiff generally has the burden to prove, by a preponderance of the evidence, each element of a cause of action, the statute may allocate that burden differently. (See Evid. Code, §§ 115

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[8] Appellant contends it proved liability because during trial proceedings, the trial court "acknowledged that [respondent] did not pay what it owed." This reference was to Pike's testimony that respondent had made partial payments. The trial court, however, never made any determination of respondent's liability in the judgment or written statement of decision. Even if it had, appellant failed to seek any amount separate and apart from the amount sought in the complaint.

["Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence"], 500 ["Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting"]; see also *Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 861 ["As a general rule, the 'party desiring relief' bears the burden of proof by a preponderance of the evidence"].) Appellant was the plaintiff, and it alleged that respondent violated the Wastewater Ordinance when it failed to fully pay the audited surcharges on multiple occasions. The trial court granted a defense verdict after finding appellant had failed to meet its burden of proving that its audited surcharge figures were reasonably accurate and were not materially in error. On appeal, appellant contends the Wastewater Ordinance does not require proof that the audited surcharge figures are reasonably accurate, and that the ordinance does not allocate the burden of proof on that issue to appellant. As explained below, we disagree.

As set forth in section 101 of the Wastewater Ordinance, the ordinance was enacted pursuant to the County Sanitation District Act, Health and Safety Code sections 4700 through 4858, and exercises authority conferred by law, including *Health and Safety Code sections 5400 through 5474* and Government Code sections 54725 through 54740. Its purpose, among others, is "to provide for the maximum possible beneficial use of the Districts' sewerage facilities though adequate regulation of sewer construction, sewer use and industrial wastewater discharges; [and] to provide for equitable distribution of the Districts' costs. . . ."

In *Boynton v. City of Lakeport Mun. Sewer Dist*. (1972) 28 Cal.App.3d 91 (*Boynton*), the appellate court held that sewer service charges authorized by Health and Safety Code section 5471 must be "'reasonable, fair and equitable, must be fixed by ordinances which are not arbitrary, and must be uniform and without

discrimination against particular property owners.'" (*Boynton*, at p. 94.) The fees must be "reasonably commensurate with the burden placed on the system by the users." (*Id*. at p. 95.) The principles apply equally to the surcharges imposed under the Wastewater Ordinance, as the ordinance exercises authority pursuant to, among other statutory provisions, Health and Safety Code section 5471. Indeed, it has been held that the Wastewater Ordinance at issue "allows the District to assess surcharges only when the District services are used by industrial customers and only in an amount proportionate to their use." (*In re Lorber Industries* (9th Cir. 1982) 675 F.2d 1062, 1067.)

The language of the Wastewater Ordinance supports the interpretation that the surcharges must be fair and reasonably commensurate with the user's burden on the sewerage system. The ordinance seeks an "equitable distribution of the Districts' costs." Under the ordinance, the surcharge is determined in accordance with the strength and flow of the wastewater discharge. An audit occurs only when there is a discrepancy between "actual and reported industrial wastewater discharge quantities." Thus, the surcharges reflect fees reasonably commensurate with the burden placed on the sewerage system by the industrial discharger. Indeed, appellant has consistently argued that the audited surcharges reflected respondent's "fair share" of the costs for the sewerage system. A fee that reflects the "fair share" of costs and is based on "actual" industrial wastewater discharge is a fee that is "reasonably accurate" and not "materially in error." Accordingly, the trial court did not err in construing the Wastewater Ordinance to require that the surcharge figures be reasonably accurate and not materially in error.[9]

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[9] We note that neither *Boynton* nor the Wastewater Ordinance requires that the surcharges be accurate "to the penny." *Boynton* acknowledged that the "burden placed on a sewer system by users is not susceptible of mathematical calculation,"

Having determined that the surcharge figures must be reasonably accurate, we next examine which party has the burden of proving the reasonable accuracy of its surcharge figures. Under Evidence Code sections 115 and 500, unless otherwise provided by law, the plaintiff has the burden to prove, by a preponderance of the evidence, each element of its cause of action for violation of the Wastewater Ordinance. The Wastewater Ordinance does not expressly allocate the burden of proof on any trial issue. We thus apply the burden of proof set forth in the Evidence Code. Accordingly, in order to prevail on its cause of action that respondent violated the ordinance, appellant must show that respondent failed to fully pay a reasonably accurate surcharge.

Appellant has argued that *respondent* had the burden to substantiate its reported surcharge figures, based on respondent's duty to self-report and calculate surcharges under the Wastewater Ordinance. However, that same argument supports an interpretation that *appellant* had the burden of proof to show the reasonable accuracy of the audited surcharge figures. Under section 415 of the Wastewater Ordinance, when there is a discrepancy between actual and reported industrial wastewater discharge quantities, the chief engineer may order additional information be obtained through engineering investigations, flow measurements, wastewater sampling and analyses -- all at the discharger's expense. Based on the additional information along with any other relevant information obtained by the Districts or presented by the discharger, "[t]he Chief Engineer shall then make a

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and required only that the fee be reasonably related to the burden imposed on the sewer system. (*Boynton*, *supra*, 28 Cal.App.3d at p. 96.) The Wastewater Ordinance requires that the estimated surcharges be "in accordance with generally accepted engineering estimating practices." We reject the notion that calculations resulting in materially erroneous surcharges are consistent with generally accepted engineering estimating practices.

determination of the amount of any wastewater treatment and disposal charges plus charges for costs of obtaining additional information which are due to the Districts, together with any interest and penalty charges due . . . ." In light of appellant's duty to calculate the audited surcharges, we conclude it had the burden of substantiating its audited surcharge figures. (See *Oildale Mutual Wat. Co. v. North of the River Mun. Wat. Dist.* (1989) 215 Cal.App.3d 1628, 1634 [in determining whether fee imposed by water district exceeded the reasonable cost of providing the water, burden of proof was on water district].)

C. Whether Substantial Evidence Supported the Judgment

The trial court determined that appellant's audited surcharge figures were not reasonably accurate because those figures were "materially in error." Appellant contends there was insufficient evidence to sustain the trial court's determination. We disagree. "In general, in reviewing a judgment based upon a statement of decision following a bench trial, 'any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision. [Citations.]' [Citation.] In a substantial evidence challenge to a judgment, the appellate court will 'consider all of the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in support of the [findings]. [Citations.]' [Citation.] We may not reweigh the evidence and are bound by the trial court's credibility determinations. [Citations.] Moreover, findings of fact are liberally construed to support the judgment. [Citation.]" (*Estate of Young* (2008) 160 Cal.App.4th 62, 75-76.) Furthermore, "where the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. (*Roesch v. De Mota* (1944) 24 Cal.2d 563, 570-571; *Caron v. Andrew* (1955) 133 Cal.App.2d

402, 409.) Specifically, the question becomes whether the appellant's evidence was (1) 'uncontradicted and unimpeached' and (2) 'of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.' (*Roesch v. De Mota, supra*, at p. 571.)" (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.)

Appellant presented evidence that the audited surcharge figures were derived from formulae prepared in accordance with generally accepted engineering practices. Appellant also presented evidence that respondent failed to substantiate the reported deductions. Respondent, however, produced evidence that challenged the reasonable accuracy of the audited surcharge figures. For example, respondent presented evidence that the dye house had three fans. Appellant's own witness Shadler acknowledged that the effects of the three fans were not considered in the audits. She testified that if the three fans had been included in the calculations, the resulting evaporative loss deductions would have been more than twice the percentage appellant had calculated. Respondent also produced evidence that the temperatures inside the building were higher than the temperatures used in appellant's calculations. Shadler conceded that higher temperatures could result in higher evaporative loss. She also admitted that the audits failed to consider any air exchange from ventilation, cross-breezes, or seepage, such as from opened skylights.

Respondent also produced the only expert testimony on the reasonableness of the surcharge calculations. Kraim opined that appellant's figures were not accurate because it used average meteorological data and assumed a single fan. Kraim specifically opined that the use of average meteorological data made the calculations significantly inaccurate. Kraim also opined that appellant's calculations were inaccurate as a result of its failure to consider the effects of an

electric drying oven and water retention in the finished garments. Appellant was on notice that the accuracy of its own figures would be challenged, as Kraim's August 2013 report expressly addressed appellant's calculated surcharge figures and disputed their accuracy.

Nonetheless, appellant put on no rebuttal case, and declined to call its designated expert witness. On this record, we conclude that, as a matter of law, the trial court did not err in granting a defense verdict. The court's determination that appellant's audited surcharge figures were materially in error was supported by Kraim's and Shadler's trial testimony. The testimony of even a single witness is sufficient to support a factual determination, even if contradicted (*In re Frederick G.* (1979) 96 Cal.App.3d 353, 366), unless physically impossible or obviously false. (*Watson v. Department of Rehabilitation* (1989) 212 Cal.App.3d 1271, 1293; see *Daly v. Wallace* (1965) 234 Cal.App.2d 689, 692.) Appellant has not attempted to demonstrate that Shadler's and Kraim's testimony about evaporative loss contradicted the laws of physics or was obviously false.

For the first time on appeal, appellant challenges Kraim's competency, argues that his testimony lacked foundation, and asserts that it was irrelevant. Appellant raised none of these objections below. Well aware from Kraim's December 2012 and August 2013 reports that he intended both to support respondent's figures and to challenge the accuracy of appellant's calculations, appellant neither challenged his qualifications nor objected to his testimony. His expert reports were admitted without objection, and appellant never sought to

strike his testimony. On this record, appellant has forfeited any claim that the trial court erred in considering Kraim's expert testimony.[10]

In sum, the trial court had before it sufficient evidence to conclude that appellant's audited surcharge figures were materially in error and thus, not reasonably accurate. Accordingly, appellant could not prevail on its causes of action for statutory violations because it failed to meet its burden of proving that its audited surcharge figures were reasonably accurate. Because appellant sought no remedy other than the full amount of the audited surcharges, the trial court did not err in entering a defense verdict and denying appellant any damages. Moreover, in declining the court's invitation to argue that the evidence at trial proved any other figure represented a reasonably accurate fee, appellant forfeited any claim of error in the trial court's determination to award nothing.

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, J.

We concur:

EPSTEIN, P. J. COLLINS, J.

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[10] We also reject any claim that as a matter of law, the Wastewater Ordinance precludes consideration of Kraim's testimony. As discussed, the ordinance provides no express limitation on evidence that can be presented at trial.